Office-Supreme Court, U.S.
FILED
AUG 22 1968
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

SEPTEMBER TERM, 1968

No. 429

ALFRED LOUIS CAPPABIANCA,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States.

The petitioner, Alfred Louis Cappabianca, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case, July 23, 1968.

The opinion of the Court of Appeals, (Smith, Kaufman and Hays, Circuit Judges), is thus far unreported and is reprinted in this petition beginning at page 27.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

STATEMENT OF THE CASE

Petitioner Alfred Louis Cappabianca here seeks relief from the action of the Court of Appeals in affirming judgment of the United States District of Connecticut in an action in which Cappabianca was charged, along with Edward Reed and petitioner William Sasso, with violation of 18 U.S.C., Sec. 2113(a), (b) and (d), Count 1 charged robbery, Count 2, larceny of more than $100, Count 3, an assault and jeopardizing the life of a certain bank employee. Following a trial, the jury found Sasso and Cappabianca guilty on all three counts and Reed guilty on Count 2, and Judge Zampano senteneed Cappabianca to serve years, suspended sentence on Counts 2 and 3.

An appeal was taken to the Court of Appeals for the Second Circuit; that court on July 23, 1968 affirmed the convictions of Cappabianca and Sasso and reversed the conviction of Reed. A petition for stay of mandate was filed with the Court of Appeals but as of this moment no action has been taken on the petition.

QUESTIONS PRESENTED

1. Was Sasso's arrest and search of Room 315 illegal?
2. Was Cappabianca's arrest and search of his room illegal?

3. Was the dismantling of the motel room plumbing hours after Sasso's arrest illegal?

4. Was the defense entitled to the informer's identity?

REASONS FOR ALLOWANCE OF THE WRIT

Statement of Relevant Facts and Proceedings.

A few minutes after 4:00 P.M. on Friday, April 28, 1967, three armed, masked bandits entered the rear door of the Allingtown branch of the First New Haven National Bank in West Haven, Connecticut. One, the shortest of the three, wearing a "ski mask," remained in the lobby covering all of the customers and the employees, with a gun, from there. The other two men, wearing "Halloween masks," hurdled the counter. One stayed at the teller station furthest to the rear of the bank, forced two people in a back room to lie down flat on their faces, and emptied that teller station. The third man, after having the tellers and the manager either lie down, squat down or stand back, proceeded to rifle the remaining three teller stations. After approximately two or three minutes in the bank, the three men left with $25,402.00 of the bank's money. (166a)

Not quite twelve hours later, at almost 4.00 A.M. on April 29th, the defendant Sasso was arrested in Room 315 of the Holiday Inn, a motor hotel near downtown New Haven. Upon his arrest, a search of his person revealed approximately $1,100.00, (192a) containing bills which were identifiable as having been taken from the bank. (201a, 204a) In searching the room, the officers found, in a paper bag behind one of the drapes, (193a) an additional $9,000.00 or so, also including so-called "bait money." (201a, 204a) The money, along with two paper bags, some drinking glasses from the room and a plastic telephone guide bearing three telephone numbers, were

sent to Washington for fingerprint analysis. (202a-206a, 247a) One of the three telephone numbers written on the plastic guide was of a local garage which received a call from Cappabianca at approximately 5:00 P.M. on the afternoon of the robbery. (219a, 220a) The commode in the room was dismantled (73a) and a mass of wadded paper, apparently torn up bank wrappers, (246a) was seized and sent to Washington. Prints were found on one of the drinking glasses (256a) and Cappabianca's prints were identified on one of the paper bags and one of the glasses. (254a, 257a) When Cappabianca was arrested later on the morning of April 29th, police officers searched his room and found a ski mask identified as similar or identical to the one worn by the short robber in the lobby. (112a)

Motions to suppress evidence were filed by all defendants (6a) and were denied, *sans* hearing, by Judge Timbers without prejudice to their being reviewed at time of trial. (2a) Judge Zampano held a lengthy evidentiary hearing, after which he denied all motions. The only searches now relevant to the case were those of the motel room where Sasso was arrested and the basement where Cappabianca was sleeping when arrested.

It is undisputed that there was neither a warrant to arrest Sasso nor to search the room. The question of probable cause for the arrest is therefore crucial. The principal and "lead" witness on the question of probable cause was Sergeant J. J. McGowan of the New Haven Police, who led the arresting party. McGowan testified he had heard from other officers of the holdup, and that of the three men involved, two were "sort of tall — one heavy and one slim, and one of 'of shorter stature'." (18a) He knew Sasso was awaiting sentence on another charge, had hair of a "reddish tint color" (as some other officer had told him), and had "heard" he was the subject of an

alert put out the day before by the State Police. (19a, 27a) Apparently McGowan had also "heard" that both a police officer and "some civilian" had seen Reed and Cappabianca together earlier on the day of the robbery. (21a, 34a) Even before receiving a report from Inspector Ahearn, McGowan, the original "reasonably prudent police officer," "was definite on Sasso" and "believed . . . Mr. Reed and Mr. Cappabianca had been involved." (22a) At approximately 12:45 A.M. on April 29th, McGowan was informed by his superior, Inspector Ahearn that "he had reliable information that the perpetrators of the bank job in West Haven have been committed by William Sasso, Mr. Edward Reed and Mr. Alfred Louis Cappabianca" and that they were "using the Holiday Motel . . . as a meeting place."

At approximately 12:30 A.M. on April 29th, Inspector Ahearn received a telephone call from an unidentified informant whom the inspector had known for about 10 or 12 years, and who had, in the past, given information on 50 occasions which had led to an arrest and conviction in approximately 30 instances. (45a)

The informant does have a criminal record. (46a)

The informant stated that "William Sasso, Mr. Reed and Mr. Cappabianca were responsible for the bank robbery earlier on that date in West Haven and that they were staying at the Holiday Inn at 30 Whalley Avenue." (44a) "His source was almost personal . . . personal contact with the people involved." (45a)

Q. You told Mr. Newman on direct examination that the person who called you had told you that the source of his information was, as I recall almost personal, "That he had had personal contact with someone," I assume one of the defendants. Is that what you told Mr. Newman?

A. That's correct.

Q. Now, I am asking you whether the man who called you told you the name of this man which you said was his source?

A. I said, if I answered this question that would certainly indicate to the subjects involved who the informant was. (48a-49a)

Later, Inspector Ahern stated that the informant had stated that "He had had personal contact with the perpetrators." (Tr. 164)

The informant did not tell the Deputy Inspector "Where he had had contact with one or more of these people." (51a)

The record does not disclose *when* the alleged mentioned contact was made. (51a)

Other than telling the Deputy Inspector that Sasso, Reed and Cappabianca were responsible for the bank robbery in Allingtown and that they were at the Holiday Inn, the informant told him nothing further. (52a)

At the time the Deputy Inspector received this information from his informant, he had information as to the physical characteristics of the three people who had robbed the bank, to wit; "Two of the subjects were tall, one of the taller ones had reddish brown hair and one was very short." . . . "I'd say it fitted the description, the general description" of the three defendants. (46a)

Inspector Ahern knew that Reed and Cappabianca were under surveillance that night, (Tr. 168) and that about 1 A.M. or 1:30 they had been seen and followed from Paul and Shorty's Restaurant to the International House of Pancakes. (52a, 55a)

Certain other persons were under surveillance, William Costigi, a Donald Knight and a Larry Mannwehr. (55a, 56a)

A maroon Ford automobile had been suspected as a vehicle used in connection with the robbery. (30a, 42a, 43a)

In fact, after the robbery, a police teletype listed as suspects, William Sasso and Robert Apicella. (27a)

Twe men, one Apicella, 6 feet 1 inch tall and slim, and one Toscano, 5 feet, 5 inches or six inches in height, were being held at the New Haven Police Headquarters. (44a)

When the police officers went to the motel to check the register, they took along photographs of some 25 persons to show the clerk for identification.

Cappabianca's photograph was not among the likely suspects. (69a, 70a) The police teletype broadcasting the names of the suspects did not include that of Cappabianca. (27a)

Nicholas Pastore, a detective on the New Haven Police Department testified that he had received information from Inspector Ahern that persons responsible for the robbery were Cappabianca, Reed and Sasso. (Tr. 504) and that they were said to have been using the Holiday Inn at 30 Whalley Avenue (Tr. 505); that Cappabianca used to consort with known felons in the New Haven area, (Tr. 506); that he had suspicions regarding Cappabianca concerning crimes such as bank robberies, burglary, breaking and entering (Tr. 508); that about a week before the robbery, he had seen Cappabianca, Reed and Sasso together in New Haven, (Tr. 508) on a sidewalk close by the University Restaurant with three or four other persons present, (Tr. 512); that he had no knowledge of Cappabianca's record, (Tr. 515); that he had no knowledge when any of the defendants had been convicted of anything, (Tr. 518-519); that he knew many persons of 5 feet 2 inches; that in fact, the descriptions received from the bank fits any number of people, (Tr. 522); that it was Inspector Ahern who had put him on the trail of the three defendants, (Tr. 529); that at

about 1 A.M., he received information from Detective Ahern that Cappabianca and Reed were seen on Whalley Avenue, (Tr. 531-2); that at 7 A.M. on April 29th, without a warrant, members of the New Haven Police went to Coe Street and with drawn guns, entered the basement room where Cappabianca was found in bed and undressed. In the room, there was a bar and a small bureau where Cappabianca was placed under arrest. (Tr. 532-535)

When Detective Pastore arrived at the Coe Street address, he was let in by Cappabianca's brother-in-law upon being informed of the reason for their mission. (Tr. 509)

McGowan proceeded to the motel with another police officer and two F.B.I. men, including Special Agent Rosenquist. (36a) He found that Room 315 had been registered in the name of Reed, but a call to the room revealed that, apparently, no one was in it. (22a, 23a) The motel, and all entrances to it were then staked out for the next two or two and one half hours, and none of the defendants were seen to enter or leave. (23a, 24a) During this time, McGowan knew that Reed and Cappabianca were elsewhere, at the International House of Pancakes. (23a) At about 3:45 A.M., Ahern told him there was someone in the room, as a phone call had gone through, (37a) which occupant McGowan concluded was "likely" Sasso. (24a) A few minutes later, he went with others to Room 315; (24a) the arrest was made "Immediately" (24a) and the search ensued. (25a)

Sasso's Arrest And Search Of Motel Room 315 Illegal.

The Supreme Court, in *Beck* vs. *Ohio*, 379 U.S. 89, 96 (1964), labelled the type of hearing held here as the substitution of "the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced

by the familiar shortcomings of hind sight judgment" in the place of "an objective predetermination of probable cause." The kindest thing that can be said about McGowan's testimony and his ordinarily prudent "probable cause" is that it fairly reeks with those "subtle influences." Although the so-called reddish tint of hair was an important factor in the suspicion and/or identification of Sasso, at trial it was clear that Sasso's hair is brown (109a, 123a) and that Mrs. Joyce had told no one that one of the robbers had reddish hair. (123a) It was very convenient that McGowan, who had absolutely no first or second hand information, made the arrest. Significantly Special Agent Rosenquist, who had been in charge of taking statements from the eyewitnesses at the bank, went to the Holiday Inn after 1:00 A.M. armed with photographs of about 25 potential suspects. (69a) He stated further that the three defendants became suspects, as far as he was concerned, at one o'clock with the receipt of the Ahern communique. (69a) Before that time, he had been alerted to Sasso of course by the teletype the day before.

There are many more evidences of "subtle influences" which went into making up McGowan's probable cause. Although he knew that Reed and Cappabianca had been "very frequently" with two men "involved in" an earlier bank robbery in Springfield, he "was not too familiar with all this background as far as their criminal activity." (25a) He did not know that both of them had been essentially free from serious trouble for eight or nine years or of Reed's record of employment (38a) or that not one of the three accused had ever been convicted of an armed robbery, and only Sasso had ever been charged with one.*

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*The above mentioned Springfield robbery, of which charge, parenthetically, Sasso was recently acquitted after a jury trial.

Although McGowan readily testified concerning the teletype alert on Sasso the day before, it was only after defense counsel saw the message that he told the court that one Robert Appicella was also mentioned in the alert. (27a) For some reason although Appicella was mentioned with Sasso in the teletype, and McGowan had spent the entire evening of the 28th searching for the maroon Ford, (30a, 31a) when he found it, and Appicella with it, McGowan didn't remember a single blessed thing about his questioning of Appicella. (41a, 42a) Notwithstanding the fact that Appicella was found with the car, McGowan "believed" Reed and Cappabianca were involved even before Ahern's tip. (22a) Although McGowan had "heard" that Reed and Cappabianca had been seen together earlier on the day of the robbery by both a policeman and a civilian, strangely the Government never called either of those gentlemen as witnesses. Fortunately for the sergeant's probable cause frame of mind, apparently he had not "heard" from Detective Pastore that Sasso and Appicella were together, only a day before the robbery, in the maroon Ford, when they eluded a police tail. (83a) Agent Rosenquist had two dozen suspects; half the New Haven Police force spent half the night following half of the suspected criminal types in the city—except Reed and Cappabianca; (55a, 56a) but Sergeant McGowan, the one man with no first or second hand information —he had "probable cause" that the robbers were Sasso, Reed and Cappabianca.

The conclusion is inescapable that, without the "reliable" informant, there was nothing even vaguely approaching probable cause. A close look at Ahern's affidavit and testimony reveal that it too falls short of establishing legal grounds for the arrest and search. This "information" given Ahearn (and passed on to McGowan) about the robbery was entirely conclusory — that the defendants were "responsible" for the robbery, plus the "fact" that they were "staying at" or using the Holiday

Inn as "base of operations." (44a, 390a). *Aguilar* vs. *Texas*, 378 U.S. 108 (1964) sets up the rule that when probable cause is based upon an informer, facts must be given to justify both the informer's "reliability" and underlying basis for his present information or belief. To establish probable cause, facts must be asserted, not conclusions or vague generalizations. *State* vs. *Bartlett*, 200 N.E.2d 660. *State* vs. *Moriarty*, 189 A.2d 210 *People* vs. *Fino*, 250 N.Y.S.2d 47, 14 N.Y.2d 160. *United States* vs. *Jones*, 362, U.S. 267. *Baysden* vs. *United States*, 27 F.2d 827.

In *William* vs. *Commonwealth*, 349 S.W.2d 825, an affidavit was held insufficient in law despite the declaration of the affiant that he had personal knowledge, because it did not state how and when the affiant's observations were made. In the case at bar, the informant made no personal observations.

We will concede, for purposes of argument here, that Ahearn's testimony as to past reliability justified Judge Zampano's finding in that particular; there were however, no facts or circumstances stated to the court (or apparently to Inspector Ahearn either) justifying the informer's belief that the defendants were responsible for the robbery. 378 U.S. 108, at 114. Ahearn first stated that the informant's source was "almost personal — personal contact with the people involved." (45a) Later, he stated that the informer "had personal contact with the perpetraters." (51a) He had not told Ahern where the "personal contact" took place, (52a) and Ahern, sustained by the court, refused to divulge when the alleged personal contact was had. (51a) The failure to state any date or time when the purported facts happened rendered an insufficient basis to create probable cause. *Segro* vs. *United States*, 287 U.S. 206 at p. 211. *Webb* vs. *Commonwealth*, 339 S.W.2d 177, 178. *Williams* vs. *Commonwealth*, 355 S.W.2d 302. *Messer* vs. *Commonwealth*, 350 S.W.2d 486; justifiable

probable cause must exist at the time . . . not at some earlier date. *United States* vs. *Sawyer*, 213 F. Supp. 38, 40. *Shoeneman* vs. *United States*, 317 F.2d 173. *United States* vs. *Bosch*, 209 F. Supp. 15. Probable cause cannot be found when facts are silent as to the time when the observations were made. *United States* vs. *Malugin*, 200 F. Supp. 764.

Still later, in response to a question from the court, he stated.

> "From what I gather, and I don't — It is vague to me, to be honest with you, Your Honor, but from what I gathered from his conversation, he had contact with all three subjects." (60a)

Ahern's testimony on the subject was as follows:

Q. Did he tell you the name of the person whom he had received information? That can be answered yes or no.

The WITNESS. Your Honor, I can't answer the question yes, or no, and I can't answer without pinpointing the informant. (Tr. 157-158)

It is clear from this answer that had the contact been made by the informant, the answer of their witness would have been that there was no person other than the informant involved. But, instead, his answer was predicated on the ground that the answer would pinpoint the informant. This is further explored and clarified:

Q. You told Mr. Newman on direct examination that the person who called you told you that the source of his information was, as I recall, "Almost personal," that he had had personal contact with someone, I assume one of the defendants. Is that what you told Mr. Newman?

A. That's correct. (Note, not all three defendants — only one of the defendants)

Q. Now, I am asking you whether the man who called you told you the name of this man which you say was his source?

A. I said if I answered this question that would certainly indicate to the subjects involved who the informant was. (Tr. 158)

The court then noted. "But I think it is relevant as to whether or not the informant was acting on a hearsay report from somebody else."

Mr. GRUDBERG. That is right.

The COURT. Or whether he was acting on something he personally observed or knew, and I will allow that.

Q. All right. Perhaps I misunderstood you. Did the informant himself indicate that he personally had received knowledge almost personally or that he had received it from someone else who told him that his source in turn was almost personal? Do you understand that one?

A. Yes, I understand that. It is still a problem to answer it, without identifying him. (Tr. 159)

At this point, it is quite clear that the source of the informant's knowledge was a hearsay from another person. Later on, the Inspector testified that the informant had had personal contact with the perpetrators, (Tr. 164), reversing his former position.

Later on, to add to the indefiniteness when questioned by the court:

The COURT. Let me ask you this. Did the informant tell you with whom he had personal contact?

The WITNESS. From what I can gather, and I don't . . . It is vague to me, to be honest with you, Your Honor, but from

what I gathered from his conversation, he had contact with all three subjects. (Tr. 190)

Now, we have an interpretation placed by the officer on what he gathered from the informant. This is clearly insufficient.

Thus, we have four explanations. First, the source was almost personal — personal contact. Second, Inspector Ahern refused to state whether the informant had given him the name of the man who was the source of the informant's information. Third, the informant had personal contact. Fourth, Inspector Ahern admitted that it is vague, but from what he gathered from his conversation, the informant had contact with the defendants.

What and where are the underlying circumstances required by *Aguilar*? Did the informant see the defendants splitting up the money? Did all three confess the robbery to him within minutes or hours after it took place? Had he been in the room at the Holiday Inn? Had he been with them, or overheard them, when a, or the robbery was being planned a day, a week — or a month before? Had he been driving the getaway car? Had he helped dispose of guns, masks, etc.? We really know nothing of the crucial underlying circumstances — we only know he stated the three defendants were the guilty ones based upon "personal contact" or "almost personal contact" which Inspector Ahern had to "gather from the conversation." Surely that does not satisfy *Aguilar's* first requirement.

The type of factual information obtained from the informer, and passed on to the judicial officer, in *Jones* vs. *United States*, 362 U.S. 257 (1960), is more or less a model as to the type of underlying circumstances which must be submitted to the court to justify use of an informant's hearsay as a basis for probable cause. Where underlying circumstances have not been set forth, as here, the courts have not hesitated to void

the search. In *United States* vs. *Gebell*, 209 F. Supp. 11 (E. D. Mich. 1962) (a pre-*Aguilar* case), a warrant was held issued without probable cause which was based on the conclusionary statement of guilt (as we have here) from "confidential information, considered reliable" and at least as much corroboration as that in the case at bar. See also *United States* vs. *Betz*, 205 F. Supp. 927 (E. D. Mich. 1962). The holding of the Fourth Circuit in *Baysden* vs. *United States*, 271 F.2d 325 (4 Cir. 1959), is here germane. In *Baysden*, the affidavits contained the conclusion of guilt and some specific facts as to where the contraband probably was, but the warrant was no good because there was no statement of the source of the information; here we have the "source" stated as "Old Reliable," but not the vaguest idea of exactly what facts he had learned, or how, when and where he had learned them.

Draper vs. *United States*, 358 U.S. 307 (1959) does not help the Government. As stressed by the Supreme Court in *Beck* vs. *Ohio*, 379 U.S. 89 at 95, *Draper* involved a named government special employee who had given to the arresting officer far more detailed information than that obtained here by Inspector Ahern. This Court, in *United States ex rel DeNegris*, vs. *Menser*, 360 F.2d 199 (2 Cir. 1966), stated that information from an informant very much like that obtained here was "not distinguishable in nature and scope from that held to be insufficient in *Aguilar*." Under the rule set down by this Court in *United States ex rel Rogers* vs. *Warden*, 387 F.2d 209 (2 Cir. 1967), the information given Ahern falls short of establishing probable cause. See also *Spinelli* vs. *United States*, 382 F.2d 871 (8 Cir. 1967). The fact of alleged "personal contact" or "personal knowledge," without the particulars of what, when, where and how, avails the Government not at all; such broad, meaningless statements do not establish probable cause. *Henson* vs. *Commonwealth*, 347 S.W.2d 546 (Ky. 1961). Almost all of the cases cited involve the sufficiency of affidavits

but, as pointed out in *Beck*, the required showing here "surely cannot be less stringent than when an arrest warrant is obtained." 379 U.S. 89 at 96. *Wong Sun* vs. *United States*, 371 U.S. 471, 479-80, (1963).

Conclusions, suspicions or beliefs in place of facts, will be held to be insufficient in law to support a finding of probable cause. *Segro* vs. *United States*, 287 U.S. 206, 210, 211. *Nathanson* vs. *United States*, 290 U.S. 41. *United States* vs. *Jones*, 362 U.S., 269. *United States* vs. *Betz*, 205 F. Supp. 927, *State* vs. *DeGrazio*, 188 A.2d 399. *People* vs. *Beshany*, 252 N.Y.S.2d 100, 113. *United States* vs. *Conway*, 317 F. Supp. 853, 858. *United States* vs. *Gebell*, 209 F. Supp. 11. *State* vs. *Moriarty*, 189 A.2d 210. *People* vs. *Fino*, 250 N.Y.S.2d 47, 14 N.Y.S.2d 160. *United States* vs. *Dixon*, 334 F.2d 322. *State* vs. *Hutchins*, 202 A.2d 678. *State* vs. *Bartlett*, 200 N.E.2d 660. *United States* vs. *Simms, Jr.*, 201 F. Supp. 405. *State* vs. *Racanelli*, 181 A.2d 420. *United States* vs. *Alexander*, 202 F. Supp. 209. *Baysden* vs. *United States*, 271 F.2d 325. *People* vs. *Coscia*, 250 N.Y.S.2d 308. *State* vs. *Macri*, 178 A.2d 383, 385-6. *United States* vs. *Elliott*, 210 F. Supp. 357. *United States* vs. *Conway*, 217 F. Supp. 853. *United States* vs. *Betz*, 205 F. Supp. 927.

Sometimes it is difficult to see by, or through, the smoke screen about what evil people the defendants may be, and what bad company they keep — the court must however, in all fairness, do that. It is clear, we think, that McGowan's so called probable cause, without the informant, was but a tissue of of suspicion and guesswork. Since the informant provided only a bald conclusion, totally devoid of any underlying facts, or circumstances, he adds essentially nothing. The arrest of Sasso was without probable cause and the subsequent search illegal. The motion to suppress evidence should have been granted.

CAPPABIANCA'S ARREST AND SEARCH OF ROOM ILLEGAL.

What is the basis for Cappabianca's arrest? He was not even a suspect until the informer's tip. The FBI had some 25 photographs of possible suspects. That of Cappabianca was not known to be among them. (Tr. 300) He had no known criminal record of any consequence. McGowan "Had suspicions as who the 3 persons might be." (Tr. 242) He himself believed that Reed and Cappabianca had been involved. Officer Pastore made the arrest on the morning of April 29th, (Tr. 503), at 7 A.M. (Tr. 532) Police information gave him suspicions as to Cappabianca. (Tr. 508) He had no knowledge of any prior record. (Tr. 514) He did not know of any convictions within the past 10 years. (Tr. 515) He knew many persons of 5'2". (Tr. 522) The descriptions given by the bank fit any number of people. (Tr. 522) Inspector Ahern put him on the trail at 1 or 1:30 A.M. (Tr. 529)

Thus, Cappabianca's arrest was predicated solely on the informant's conclusion.

Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. A search without a warrant cannot be justified on an assumption founded on suspicion arising from an informant's conclusion giving rise to a suspicion by the police. "Otherwise the constitutional test or reasonableness would turn only on practical expediency and the amendment's primary safeguard — the requirement of particularily would be lost. Just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen." *Meyer* vs. *United States*, 286 F.2d 715 at p. 718.

In *Morris* vs. *Bolen*, 286 F.2d 395, observations had been made for some time prior to the arrest, the day before defendant was seen committing theft by the assistant manager. *Morris* vs. *Bolen*, 386 F.2d 395, 398. *Shue* vs. *United States*, 385 F.2d 417, convictions were justified upon facts, the smell of the odor of illicit whiskey together with what they observed and heard. In *United States* vs. *Desist*, 384 F.2d 889, a complete statement of facts supplied by the informant checked out. *Smith* vs. *United States*, 385 F.2d 34, 37.

In *United States* vs. *Warden of Attica State Prison*; 381 F.2d 209 at p. 219, the court said, "We do not, however, read the court's language to mean that whenever a surveillance is conducted, it will ipso facto serve to corroborate the otherwise insufficient hearsay conclusions of an informant regardless of how indefinite or unsound the surveillance may be . . ."

How sound was the surveillance? When at 4 A.M., the officers entered the room, they had no idea who was in the room except a hopeful speculation that it might be Sasso.

The most that can be said of the room registered to Reed, is that it was a beginning, a starting point with which to work toward developing facts which may furnish an adequate basis to support a warrantless arrest made on probable cause. At best, a room registered in the name of John Read was a starting point.

The informant's tip was that the three named defendants were using the Holiday Inn as a meeting place. This fact was never confirmed. Had the three defendants used or been in Room 315? Had they been together at any time at the Holiday Inn? Had this fact been established by surveillance or investigation, the arresting officers may have had a fact which may be advanced as some corroboration. But no such evidence was uncovered. The surveillance was undoubtedly

maintained from 1 A.M., to 4 A.M. for the purpose of learning whether or not the three defendants were using the Holiday Inn as a meeting place to shore up by some additional support the information based on hearsay with which to support a finding of probable cause. *United States* vs. *Warden of Attica State Prison, supra,* at p. 216. The additional support failed to materialize and so the officers were left stranded with an informant's conclusory tip without the support of a material fact that the three defendants were using the Holiday Inn as a meeting place.

While the officers learned of a room registered to a Edward Reed, they never did determine whether the person who registered the room was, in fact, Edward Reed, or whether it was another Edward Reed or a person using the name. This was an important fact. However, the officers assumed that the Edward Reed who registered, was, in fact, the defendant, Reed. This is pure speculation. There is nothing in the record to indicate that the defendant Reed was seen or known to have been at the Holiday Inn either alone or with either of the two other defendants or that it was he who in fact engaged the room. Thus, even the starting point is predicated on an assumption and speculation,

As to Cappabianca, the surveillance disclosed absolutely nothing. No one claims to have seen him at the Holiday Inn at any time either alone or in the company of anyone including the defendants. In fact, from the time Inspector Ahern received the informant's tip, he knew where both Reed and Cappabianca were and where they had been. He knew that they were not and had not been at or near the Holiday Inn. He knew that Cappabianca was not in flight or likely to be in flight.

The robbery had taken place at about 4 P.M. on April 28th. About 7 A.M. on the 29th, 15 hours later, the local police call at the Cappabianca home and make an arrest without a warrant

and search the room in which he was sleeping. They seek to justify the search as one incidental to a legal arrest. During the night of the 28th and the early morning hours of the 29th, the police knew where he was. There was no apparent concern by the police even though the police knew that an informant's tip had stated that Cappabianca was one of the three men responsible for the robbery. No arrest was made. There is ample time, perhaps, a little inconvenient, but nevertheless, time to secure a warrant. But no effort is made to secure one. No reason is offered for not obtaining a search warrant. It is respectfully submitted that on these facts, the arrest and search were illegal. *Johnson* vs. *United States*, 333 U.S. 10, at p. 15.

The Dismantling Of The Motel Room Plumbing Hours After Sasso's Arrest Exceeds The Bounds Of A Search Allowed Incident To An Arrest.

We have just argued that the entire search of Room 315 was illegal. Even if the arrest was legal, and the immediate search of the room proper as incident to it, the subsequent take over of the entire room for a period of eight hours or more and the exhaustive search, which included the dismantling of the commode was unreasonable and illegal, even under the criteria of *Harris* vs. *United States*, 331 U.S. 145 (1947), *United States* vs. *Rabinowitz*, 339 U.S. 56 (1950) and *Abel* vs. *United States*, 362 U.S. 217, (1959).

"*Harris* and *Rabinowitz* set by far the most permissive limits upon searches incidental to lawful arrests." *Abel* vs. *United States*, 362 U.S. 217, at 235. In both *Harris* and *Rabinowitz*, the arresting officers had sought, obtained and were armed with valid arrest warrants. In *Harris*, the subsequent search was directed specifically for two $10,000 cancelled checks. The defendant was kept at the premises and the search of a four

room apartment took almost five hours. Rabinowitz approved a thorough search, incident to an arrest, of the desk, safe and file cabinets in the defendant's one room office, apparently in the presence of the accused at the time of his arrest. Abel approved a fifteen to twenty minute search pursuant to and at the time of the arrest.*

The arrest of Sasso took place at approximately 4:00 A.M. on April 29th. Eight hours later, at noon, when Special Agent Hawley arrived, a search of the room was still in progress. (72a) He thereupon participated in the search. (72a) At that time, he seized four drinking glasses and a wad of papers. (73a) The officers in the room had "taken up the toilet" — in fact dismantled the commode, to obtain the bank money wrappers later offered in evidence. (73a) All of this took place between seven and eight hours after Sasso had been brought to the police station. Both in time and the extent of the search here the actual taking apart of the plumbing, this search far exceeds the "outer limits" set by Harris.** To justify and uphold this this commandeering of the room, with a full eight hour shift worth of search long after Sasso had been taken away, as "incident to the arrest" would stretch that doctrine beyond absurdity.

In *Preston* vs. *United States*, 376 U.S. 364 (1964), the court held that a search may not be justified as incident to arrest if remote in either time or place. See also *State* vs. *Miller*, 206 A.2d 835 (Conn. 1965). In a Kentucky murder case, officers

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*A later search after Colon Abel had checked out of the hotel, was conducted only after receiving permission from the hotel manager. 362 U.S. 217, at 225, 241.

**In both *Harris* and *Abel* four Justices dissented. In *Rabinowitz* there were three dissenters and Mr. Justice Douglas took no part in the case.

were called to investigate a possible homicide, found the body, and made a search. Although that search was upheld as valid, a return the following day, and a second search which turned up a knife in an outdoor commode was held illegal. *Trevathan* vs. *Commonwealth*, 384 S.W.2d 500 (Ky. 1964) In *State* vs. *Hoyt*, 124 N.W.2d 47 (Wisc. 1963), the Wisconsin Supreme Court, although holding valid the finding of a gun upon illegal entry into the house, voided a later exploratory search of the upstairs which produced a holster. The "occupation" of the motel room here, and eight hour plus search, was nothing more than a general exploratory search without a warrant long after Sasso was gone; only by totally inflating beyond belief the doctrine of searches incident to arrest can it be justified.

The admission into evidence of the bank wrappers, if erroneous, requires a new trial. On an error based upon denial of a right guaranteed by the Constitution of the United States, the normal harmless error rules do not apply. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* vs. *Connecticut*, 375 U.S. 85, 86 (1963). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* vs. *California*, 386 U.S. 18, 24 (1967). Such a statement can hardly be made about wrappers typing the money to the bank.

THE DEFENSE WAS ENTITLED TO THE INFORMER'S IDENTITY: THE WITHHOLDING OF THAT INFORMATION DENIED THE DEFENDANTS DUE PROCESS.

A. Since Probable Cause Could Only Have Been Established Through The Informer, The Denial Of His Identity And Important Particulars About His Reliability Unfairly Circumscribed Defense Efforts To Question Probable Cause.

We have already argued at great length the thesis that there was no probable cause for Sasso's arrest, and do not wish to try the Court's patience by reviewing the facts again. We think it absolutely clear, however, that the other facts — the alert the day before, the sketchy description McGowan had of the three masked robbers, the "bad company" kept by defendants and the meager corroboration provided by the fact that the officers found that someone had rented a Holiday Inn room in Reed's name, fall oceans short of probable cause without the informer's call to Ahern.

The rule in this circuit has traditionally been that where the informant's communications are "essential to the establishment of probable cause," disclosure of his identity is compulsory on a challenge of probable cause. *United States* vs. *Eligisser*, 334 F.2d 103, 110 (2 Cir. 1964); *United States* vs. *Rosario*, 327 F.2d 561, 564 (2 Cir. 1964); *United States* vs. *Robinson*, 325 F.2d 391, 393-4 (2 Cir. 1963). Most recently in *United States* vs. *Tucker*, 380 F.2d 206 (2 Cir. 1967), the court had a chance to reassess and elucidate those earlier decision in the light of the Supreme Court's holding in *McCray* vs. *Illinois*, 386 U.S. 300 (1967). Chief Judge Lumbard, speaking for the court, held that, although *McCray* stated there was no constitutional right to the informer's identity at every hearing on a motion to suppress, the rule stated earlier in *Eligisser*, *Rosario* and *Robinson* still applied in this circuit. In further

elucidating those cases, the *Tucker* court held that "essential" to probable cause means " ' the essence or core or main bulk' of the evidence brought forth which would otherwise establish probable cause." 380 F.2d 206, at 212.

Here, according to Agent Rosenquist, who had been at the bank taking statements from the eyewitnesses, the three defendants were only among a group of 20 to 25 suspects at 1:00 o'clock the next morning when Inspector Ahern passed on the informer's tip. The only corroboration after that time was the discovery of the room in Reed's name; the other evidence after the tip was, if anything, negative. Far from "staying in" or using the room as a "base of operations," Reed and Cappabianca were known to be elsewhere in the city between one and four that morning. It is almost impossible to avoid the conclusion that the informer represented the "main bulk" of the alleged probable cause. Disclosure of the informer's identity was wrongly withheld. (48a)

In addition to withholding the identity of the informer, the court also sustained objection to a question seeking to find out the crucial information as to when the informant had his supposed "personal contact" with the defendants. (51a) We have earlier pointed out the total absence of underlying facts or circumstances concerning the actual source of the informant's conclusions and the exact nature of what information he had, if any, other than the conclusion stated.

Had he had his "personal contact" with the defendants since the robbery? Immediately before? A week before? A month before? Had he received a confession of guilt, somehow, after the fact, or had he heard the defendants half joking about holding up a bank, and using the Holiday Inn weeks before. Surely those questions are extremely important ones in any attempt to weigh probable cause. The court erred in foreclosing exploration of those questions.

B. Due Process And Basic Fairness Required Disclosure Of The Informer's Identity At Trial.

After being denied the informer's identity at the pretrial hearing on the motion to suppress the request was again renewed at trial, and denied by the court. (213a, 214a.) Disclosure of identity at trial is primarily governed by the criteria set by the Supreme Court in *Roviaro* vs. *United States,* 353 U.S. 53 (1957). There, in holding that it was error to deny to defendant the identity of a government informant who actually participated in the "buy" of heroin charged in the indictment, the Court limited the applicability of the so-called informer's privilege by the requirements of fundamental fairness. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." 353 U.S. 53 at 60-1. We submit that the informer might have been highly relevant to the defense, and that withholding his identity might have had substantial prejudicial effect.

This is not a "business" type of crime where purveyors of women, illegal whiskey, and narcotics — and takers of bets must of necessity go to the public to sustain their trade on a continuing basis. Within the underworld and quasi-underworld, lots of people, some of whom are bound to be informers, almost have to know who is peddling various kinds of illegal goods or services. This case involves an armed bank robbery by three masked men — an act which was done in a matter of minutes at the bank followed by a getaway. If we were to speculate, perhaps the informer's contact with all three amounted to some sort of mass confession, within eight hours of the crime, by three masked men who had apparently gotten away clean. Wouldn't that be a truly incredible thing for them to do?

Perhaps the informer was one of the three masked men? Perhaps he had good reason to know that a portion of the stolen money would be found in the room and wished to incriminate those defendants not present in the room. Concededly, this is to a large extent speculative, but hardly more incredible a thesis than the one the Government would have you draw from the informer's alleged "personal contact" with all three of the accused.

Without the informer, we are forced to speculate to some degree as to how he would be "helpful" to the defense. The Government's case, however, largely begins and ends with the contents of Room 315 and alleged constructive possession of its contents. Reed's last known contact with that room was at 12:40 P.M. when, the desk clerk claims, he took the key from the motel lobby. Cappabianca's last known contact was about 5:00 P.M., a scant hour after the robbery when he apparently called the garage about the car. Aside from Sasso who was found in it, the only man who apparently had some connection with that room in the early hours of the morning was the informer. Indeed, it would appear that shortly before two o'clock when McGowan put a call through, not even Sasso was present. (22a, 23a) In this circumstantial evidence case, with almost all of the circumstances flowing from the motel room, a sufficient need was shown so that fundamental fairness required disclosure of the informant.

Cappabianca was not even a suspect until the informant's telephone call. The informant has a criminal record. The Government's case rests upon the existence of probable cause, resting on the foundation of a tip from an informer of the uncertain reliability of 30 convictions out of 50 disclosures and the possessor of a criminal record. It was this tip that brought the officers to the Holiday Inn and concentrated the police efforts on the three defendants. Up to that moment, like others under suspicion, Sasso was a likely suspect. Up to this point,

neither Reed nor Cappabianca were suspects. There can be no question but that Cappabianca's arrest rests solely on the informant's telephone call.

The defense had a right to challenge the informant's status as a reliable informant, and reveal his criminal record together with the 20 odd instances in which his reports were fruitless. It had a right to challenge Inspector Ahern's acceptance of the informant as a reliable informant. As a matter of fact, the Government, realizing the weakness of its position, elected to remove from consideration, the informant's disclosure and rest upon a seizure made incidental to a legal arrest. But how can the Government's position be sound when the enforcement machinery is set in motion by the informant's disclosure. Without it there is nothing but suspicion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 536—September Term, 1967.

(Argued June 14, 1968 Decided July 23, 1968.)

Docket No. 32193

UNITED STATES OF AMERICA

Appellee,

vs.

ALFRED LOUIS CAPPABIANCA, WILLIAM SASSO and EDWARD REED,

Defendants-Appellants.

Before:

SMITH, KAUFMAN and HAYS.

Circuit Judges.

Appeal from convictions for bank robbery in violation of 18 U.S.C. §2133(a), (b) and (d), entered upon the verdict of a jury in the United States District Court for the District of Connecticut, Robert C. Zampano, *Judge*.

Affirmed as to Cappabianca and Sasso, reversed as to Reed.

ALFONSE C. FASANO, New Haven Connecticut, *for Appellant Cappabianca.*

JAMES W. MARSHALL, New Haven, Connecticut, *for Appellant Sasso.*

IRA B. GRUDBERG, New Haven, Connecticut, (Jacobs, Jacobs, Grudberg & Clifford, New Haven, Connecticut, on the brief), *for Appellant Reed.*

JON O. NEWMAN, United States Attorney for the District of Connecticut, *for Appellee.*

HAYS, *Circuit Judge*:

Defendants Cappabianca, Sasso and Reed were indicted for bank robbery in violation of 18 U.S.C. §2113(a), (b) and (d), Count 1 charged robbery, Count 2, larceny of more than $100, Count 3, an assault and jeopardizing the life of a certain bank employee. Trial was had before Judge Zampano and a jury. Cappabianca and Sasso were found guilty on all three counts. Reed was found guilty on Count 2 and acquitted on Counts 1 and 3. Cappabianca was sentenced to 17 years on Count 1, Sasso to 22 years on Count 3, Reed to 9 years on Count 2. As to Cappabianca and Sasso sentence was suspended on the remaining counts. On this appeal by all three defendants, we affirm the convictions of Cappabianca and Sasso and reverse that of Reed.

On April 28, 1967 the Allingtown branch of the First New Haven National Bank was held up by three armed men who escaped with $25,402 of the bank's money. All three robbers were masked; the smallest of the three had on a ski mask.

Early the next morning Sasso was arrested in a bedroom at a motel called the Holiday Inn. He had $1100 in a trousers pocket and a paper sack containing about $9000 was found in the room. The serial numbers on several of the bills found in the room where Sasso was arrested corresponded to the numbers on a list of bills kept in a teller's drawer in the bank to be handed out as "bait money" in the event of a robbery.

Cappabianca's fingerprints were found on drinking glasses in the room where Sasso was arrested and also on the paper bag containing the $9000. Shreds of torn up currency wrappers were retrieved from the toilet.

There was testimony to the effect that on the night of the robbery Cappabianca was seen outside the Holiday Inn carrying a paper bag the same size as the bag found in the room where Sasso was arrested. . .

Cappabianca was arrested the same morning as Sasso. In his room was found a ski mask of the type worn by one of the robbers.

I.

It is urged that the evidence found in the rooms where Sasso and Cappabianca were arrested was inadmissible because (1) the arrests were without probable cause and (2) the seizures were not incidental to the arrests.

Early in the morning of the day after the bank robbery, Inspector Ahern of the New Haven Police Department received a telephone call from a confidential informant who told him that Cappabianca, Sasso and Reed had committed the

robbery and that they were using the Holiday Inn as a base of operations. The informant stated that he had gotten his information from personal contact with the robbers. Ahern had known the informant for 10 to 12 years and had received from him reliable information on criminal activities on more than fifty occasions (including holdups), leading to convictions in at least thirty cases.

Since there was ample ground for believing the informant to be reliable and since the informant stated that his information was based on personal contacts, there was probable cause to justify the arrests. See *Aguilar* vs. *Texas*, 378 U.S. 108, 114 (1964). Moreover locating Sasso in a room at the Holiday Inn which had been rented earlier in the day by Reed[1] provided sufficient corroboration of the informant's story. See *United States* vs. *Tucker*, 380 F.2d 206 (2d Cir. 1967). The evidence found in connection with Sasso's arrest clearly furnished enough corroboration to justify the subsequent arrest of Cappabianca.

The seizure of the evidence objected to was incidental to a lawful arrest. We find no merit in the contention that some

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[1] In determining whether the police had probable cause for the arrest of Cappabianca and Sasso, it is of no importance that we reverse the conviction of Reed. Even if the informant's information is later proved to be wrong in some particulars, it may nonetheless provide an adequate basis for an arrest, if it seemed believable at the time it was received. See *United States* vs. *Tucker*, 380 F.2d 206, 212 (2d Cir. 1967):

> "In cases such as this where probable cause for arrest is at issue, rather than the guilt or innocence of the defendant, it matters little whether the informants were truthful in fact, it matters only that in the judge's view, the agents acted reasonably on the basis of all the facts at hand."

of the evidence was inadmissible because it was not taken into the custody of the F.B.I. agent until several hours after the arrest.

II.

Appellants claim that the court erred in refusing to order the government to disclose to them the name of the informant.

We have held that there was probable cause for the arrests of Sasso and Cappabianca on the basis of the information provided by the unnamed informant. However under the decision of this court in *United States* vs. *Tucker, supra,* the defense was entitled to disclosure of the name of the informant if "the information received from undisclosed sources was . . . 'the essence or core or main bulk of the case for probable cause.'" *United States* vs. *Tucker,* 280 F.2d at p. 211. *Tucker* held that where the information provided by an informant was only a part and not the main part of the government's case for probable cause, the government need not disclose the name of the informant.

In the present case, in addition to the information furnished by the informant the police, who brought about the arrests, possessed a very considerable body of knowledge as to the suspects. For example, they were acquainted with the three suspects and knew that they fitted the physical descriptions given by the bank employees. This was particularly important with respect to the description of Sasso's hair as brown with a reddish tint. The arresting officers also knew that Sasso had been seen with the other two suspects a short time before the robbery. They knew that Sasso had been convicted of breaking and entering and that the state police had issued an alert that Sasso might try to obtain large sums of money just prior to his sentencing which was sceheduled for May 2.

It is also proper in this connection to consider the corroboration of the informant's information provided by finding Sasso in a room at the Holiday Inn.

The only real question as to probable cause concerns Sasso, since if there was probable cause for Sasso's arrest, the evidence found in his room provided ample cause for the arrest of Cappabianca.

With respect to these items of knowledge the police were subject to cross-examination at the hearing on the motion to suppress the contested evidence. The additional police knowledge, which could, perhaps have provided probable cause, without relying on the informant, is sufficient to meet the requirements of the *Tucker* case. We hold, then, that the defendants were not entitled to disclosure of the informant's name.

Other objections to the conduct of the trial have been examined and found to be without substance.

III.

The evidence as to the guilt of Cappabianca and Sasso is overwhelming. In Sasso's case the sufficiency of the evidence is not seriouly contested. The evidence against Cappabianca includes the ski mask, his presence in the room in which Sasso was later arrested, the fingerprints on the bag of money together with his having been observed outside the Holiday Inn carrying a similar paper bag.

On the other hand we find the evidence insufficient to support the conviction of Reed. As a matter of fact the only evidence against him of any strength is that on the day of the robbery he rented the room at the Holiday Inn in which Sasso was later arrested. This may show that he had some connection with the robbery, and there is other evidence to con-

nect him with the robbers. It falls short of establishing that he took part in the robbery. The testimony af the bank employees indicates merely that one of the robbers was similar in size and build to Reed, and that he wore dark clothes similar in shade to those Reed was wearing earlier in the day. Even this testimony was at variance with earlier statements of the same witnesses.

We do not believe that, on the basis of this evidence, the court was warranted in submitting the issue of Reed's guilt to the jury, and we reverse his conviction.

CONCLUSION

Each of the questions presented herein poses important questions of federal criminal law which should be decided by this Court.

The writ of certiorari should be granted.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit commanding that the court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that court herein, being the case entitled in its Docket No. 32,193 *United States of America* vs. *Alfred Louis Cappabianca, William Sasso* and *Edward Reed*, and that the judgment of that court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated this 6th day of August, 1968.

Alfred Louis Cappabianca, *Petitioner*,
By: ALFONSE C. FASANO,
Attorney for Petitioner.